American Gardens Management Company and Bailey Gardens Realty Corporation *and* Local 32E, Service Employees International Union, AFL–CIO. Cases 2–CA–33475 and 2–CA–33605

December 8, 2004

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND MEISBURG

On January 31, 2003, Administrative Law Judge Raymond P. Green issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order for the reasons explained.

As explained more fully below, the judge, in his supplemental decision, expressly discredited Frias' testimony that Matthews asked him why he signed for the Union, and, in so doing, found that the General Counsel had not established a prima facie case under *Wright Line*.[2] We assume, without deciding, that the General Counsel established a prima facie case;[3] however, we find that the Respondents met their *Wright Line* affirmative defense of proving that the employees would have been discharged for lack of work, even absent their protected conduct.

Background

These cases return to the Board after remand to the judge. The amended complaint alleges that the joint-employer Respondents discharged employees Matthew Roberts and Alfred Rosales in violation of Section 8(a)(1), (3), and (4) because of their union activities and because they testified at a representation hearing. The complaint further alleges that the Respondents discharged employee Fidencio Frias in violation of Section 8(a)(1) and (3) because he assisted the Union and engaged in concerted activities.[4] The Respondents maintain that Roberts and Rosales were discharged for lack of work.

Facts

The Respondents rent residential real estate in the New York City area. In 1996, the Respondents purchased a three-building apartment complex, Bailey Gardens, at a foreclosure sale. At the time of the purchase, the buildings were in serious disrepair (having about 1200 housing code violations), and many of the apartments were vacant. The Respondents embarked upon an ambitious project to remedy the violations and renovate the apartments. In late 1997 or early 1998, the Respondents hired a contractor, JAJ Construction Corp. (JAJ), to do plumbing and wiring work at the complex, along with other renovation work. JAJ worked at the complex until about the end of August 1998.[5] JAJ had a crew of approximately 20 employees.

Roberts and Rosales were two employees engaged in this renovation process. The Respondents hired Roberts at the end of 1996. He was placed on JAJ's payroll in February 1998, removed from that payroll in August 1998, and returned to the Respondents' payroll. Rosales was interviewed by the Respondents, hired with a start date of February 9, 1998, and immediately placed on the renovation project.[6] After JAJ had completed its contract work, all of the crew was laid off except for Roberts and Rosales. They primarily continued to perform renovation work, but they also worked on occupied apartments, mostly when the building superintendent could not han-

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The Board has applied *Wright Line* to 8(a)(4) claims. *Holo-Krome Co.*, 293 NLRB 594 (1989). *Taylor & Gaskin, Inc.*, 277 NLRB 563 fn. 2 (1985).

[3] Our dissenting colleague states that this assumption allows us to "gloss over the strength of the General Counsel's case," with the corollary that we have minimized the Respondent's rebuttal burden. In our view, our assumption gives the General Counsel the benefit of the doubt regarding the strength of its case, especially in light of the judge's finding that the evidence did not establish a prima facie case. In any event, we do not utilize this assumption to reduce the Respondent's burden.

[4] In his original decision, the judge found that Frias was not discriminatorily discharged. The General Counsel did not except to that finding.

[5] There is a factual question as to when the "big renovation" project ended. In his original decision, the judge found that: (1) most of the contractor's 20 workers "left in the summer of 1999," and (2) Roberts "was put back on Bailey's payroll" in 1999. The General Counsel excepted to those findings, arguing that the correct date is 1998. The Board, in its Remand Order, stated that there might be merit to these two exceptions. Rather than deciding this point on remand, the judge simply found that it made "no difference." We find, in agreement with the General Counsel, that the correct date is 1998. We do not agree, however, that this finding is outcome-determinative.

[6] The judge erroneously found that Rosales was hired in 1999. Matthews testified that Rosales was initially placed on the contractor's payroll and later switched to the Respondents' payroll. Rosales testified that he did not recall working for JAJ, but that he was hired onto a crew with a lot of workers (apparently JAJ's crew). The relevant point is that Rosales, unlike Roberts, was not hired prior to the commencement of renovation work, but into an ongoing renovation project.

dle the volume of tenant complaints, or when an emergency situation arose.

On October 13, 2000, the Union filed a petition for an election seeking to represent all building maintenance employees at Bailey Gardens. The Respondents challenged the inclusion of Roberts and Rosales in the proposed unit, alleging alternatively that: (1) they were temporary employees, or (2) they did not share a community of interest with the remainder of the bargaining unit. The Respondents' property manager, Thomas Matthews, testified at the representation hearing that only two vacant apartments remained for Roberts and Rosales to renovate, and that, when those renovations were completed, Roberts and Rosales would be moved to another property. Roberts and Rosales both testified at the representation hearing in support of the Union's contention that they were permanent employees and thus eligible voters.

On November 27, 2000, the Regional Director issued a Decision and Direction of Election. The Regional Director concluded that Roberts and Rosales shared a community of interest with the other maintenance workers and were eligible to vote because the "prospect of their termination is not sufficiently finite." The Regional Director directed an election for December 22, 2000.

On December 8, 2000, the Respondents laid off[7] Roberts and Rosales, claiming lack of work. The Respondents have not recalled either employee or hired replacements.

Judge's Decision

On March 6, 2002, the judge issued a decision recommending that the complaint be dismissed. The judge, while not citing *Wright Line*,[8] appeared to find that the General Counsel had established the first three elements necessary to meet its initial burden under *Wright Line* (protected activity, knowledge, and adverse employment action), but not the fourth element, animus. To the extent that the General Counsel's evidence of animus consisted of statements allegedly made by Matthews, the judge discredited them—with one exception. That one exception—Matthews' alleged question to Frias as to why he signed for the Union—was not, in the judge's view, sufficient, even if credited, to establish animus. The judge stated that the timing of the layoffs (a little over 1 week after the Regional Director's decision including Roberts and Rosales in the bargaining unit) was suspicious, and that his suspicion was heightened by Matthews' testimony in the representation case that Roberts and Rosales would be moved to another property.

The judge then proceeded to find that the Respondents had met their burden of showing that they would have discharged Roberts and Rosales even absent any protected activity. Specifically, the judge concluded that the Respondents "presented *substantial evidence* that the work available . . . had so diminished by December 2000 that their services no longer made any economic sense" (emphasis added). The judge further found that the Respondents had demonstrated that "there were rational considerations for its inability to place them at other apartment complexes and for its subsequent attempts to replace them [with other employees with different experience]." The judge relied on the following: (1) at other American Gardens complexes, the normal complement of employees consisted of one superintendent, one porter, and one or two handymen (the employee complement that would have existed at Bailey Gardens, even without Roberts and Rosales); (2) the renovation work was essentially complete; (3) Matthews' testimony that "he had no place to put them"; (4) work formerly performed by Roberts and Rosales could be absorbed by long-time "floaters" traditionally employed by the Respondents to work where needed, and (5) the only employees hired by the Respondents after the layoffs were handymen qualified to do plumbing, electrical, and boiler work, skills not possessed by either Roberts or Rosales.

General Counsel's Exceptions to Judge's Decision

The General Counsel excepted that the judge erred in failing to find that Roberts and Rosales were discriminatorily discharged. The General Counsel argued that, applying *Wright Line*, it had met its burden of showing that protected conduct was a motivating factor in the Respondents' decision to discharge Roberts and Rosales, and that the Respondents' proffered reason for the discharges, lack of work, was pretextual. In support, the General Counsel emphasized: the timing of the discharges; Matthews' testimony in the representation case that, after the renovation work was completed at Bailey Gardens, he would move Roberts and Rosales to another property; and vacancy reports showing a steady turnover of apartments. Moreover, the General Counsel claimed that the judge made a critical factual error in finding that the renovation project ended in 1999, rather than in 1998. According to the General Counsel, the judge's erroneous finding that the renovation ended in 1999 led to the judge's erroneous acceptance of the Respondents' lack of work defense.

[7] The pleadings use the terms layoffs and discharges interchangeably. Because Roberts and Rosales have never been recalled, the difference is immaterial for our purposes.

[8] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 445 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983).

Board's Remand Order

On November 22, 2002, the Board issued a Decision and Order Remanding. 338 NLRB 644. The Board directed the judge to analyze these cases under *Wright Line*, noting that *Wright Line* utilizes a "preponderance of the evidence" standard, rather than a "substantial evidence" standard. The Board also directed the judge to make additional credibility determinations related to the testimony of Jose Acevedo (Bailey's superintendent) and Thomas John (president and owner of American Gardens). Member Liebman indicated that the Board would be aided by an express credibility determination regarding Matthews' alleged question to Frias as to why he signed for the Union.

Judge's Supplemental Decision

On January 31, 2003, the judge issued his supplemental decision, recommending again that the complaint be dismissed. Responding directly to the Remand Order, the judge discredited Frias' testimony regarding his one conversation with Matthews. Having discredited Frias, the judge then explicitly ruled that the General Counsel had not "made out, by a *preponderance of the evidence*, a prima facie case because she has not shown evidence of a motivational link or nexus, between the employees' protected activity and their discharges" (emphasis added). The judge then alternatively concluded that even if the General Counsel had established the requisite link the Employer had made out its affirmative defense that it would have laid off Roberts and Rosales for lack of work when it did so. In this connection, and again responding to the Remand Order, the judge expressly considered the "credible testimony" of Matthews, Acevedo, and John, and concluded that the renovation had been mostly completed by December 2000.

General Counsel's Exceptions to Supplemental Decision

The General Counsel's exceptions to the supplemental decision parallel the exceptions to the original decision. In addition, the General Counsel now excepts that the judge erred by: (1) finding that the General Counsel did not establish a motivational link between the employees' protected activity and their discharges, and finding, alternatively, that, even if the link had been established, the Respondents established their affirmative defense, (2) discrediting Frias' account of his conversation with Matthews, (3) finding that whether the bulk of the renovation work was completed in 1998, rather than 1999, was irrelevant, and (4) failing to make any credibility findings with regard to Roberts' and Rosales' testimony.

Analysis

As stated above, for purposes of our analysis, we assume arguendo that the General Counsel has established a prima facie case. We find, however, in agreement with the judge, that the Respondents have met their *Wright Line* burden of demonstrating that they would have discharged Roberts and Rosales when they did even absent Roberts' and Rosales' protected conduct.

Responding to the Remand Order, the judge made credibility findings absent from his original decision. Thus, the judge, reaffirming his conclusion that the layoffs were due to a lack of work, expressly considered evidence "including the credible testimony of Thomas Mathews, Jose Acevado and Thomas John."[9] Acevedo testified that: between October and December 2000, Roberts and Rosales had "very little work because almost the renovation of the apartments was finished"; all repair work to the bathroom floors had been completed by November 2000; in the week prior to their lay-offs, there "was little work"; since their layoffs, "there are no apartments to renovate, there are one or two apartments empty" (which perhaps would be painted); since the layoffs, he has not needed any help responding to tenant complaints; he currently has "no work" for Roberts or Rosales; he does not need Roberts or Rosales; and that their layoffs have caused him no problem in performing his job. Acevedo further testified: "There is no work. I myself don't have a lot of work." When asked who had been working at Bailey since Roberts and Rosales were laid off, Acevedo named Torres, Peres, and another gentlemen whose name he could not remember (none remained employed). He testified that Torres and Peres had both been hired as handymen, and could do plumbing and electrical work.[10]

Supporting Acevedo's testimony is John's testimony that, around December 2000, Matthews told John that he did not have enough work for some employees at Bailey, and that he asked John if they could be placed somewhere else. John testified that he had nowhere else to place them, then or now. John further testified that, since

[9] We find no merit to the General Counsel's exception that the judge "erred in failing to make any credibility findings with regard to the testimony of Roberts and Rosales." Rather, the judge, in fn. 5 of his supplemental decision, "credit[s] the testimony of the Company's witnesses to the contrary." That is, he discredited Roberts' and Rosales' testimony that there was still a significant amount of work available after December 8, 2000.

[10] The dissent argues that the fact that the handymen possessed these "additional qualifications" is irrelevant. We disagree. The record is clear that the Respondents required employees who could perform electrical and plumbing work. It only makes sense that Respondents would, consistent with its employee complements elsewhere, attempt to meet this need by hiring an employee who could serve double-duty (electrical and plumbing, plus general maintenance).

December 2000, he has not bought or refurbished any other buildings in the area.

The General Counsel advances a number of arguments in an attempt to persuade that the Respondents' lack of work defense is pretextual. By its argument regarding the correct "end" date of the renovation project, the General Counsel attempts to show that Roberts' and Rosales' employment was not tied to the renovation project. Specifically, the General Counsel argues that Respondents had enough renovation and maintenance work to retain Roberts and Rosales full time for 2 years after the "big" project ended—that is, until they testified in the representation case. The judge, rejecting the General Counsel's argument that correcting the end date undermines the veracity of the Respondents' *Wright Line* defense, simply stated that the end date made "no difference." While we understand the arguable relevancy of the time span between the end of JAJ's contract work and the date of the discharges, we do not think that the General Counsel's argument carries the day. It can just as easily be argued, as the Respondents essentially did, that the time lag between the end of the renovation project and the discharges merely gave Roberts and Rosales time to finish the "residual" renovation work, thereby working themselves out of a job.[11]

Similarly, by its "shifting defenses" argument, the General Counsel attempts to establish that the Respondent's lack of work defense was cobbled together after the fact. Again, however, as the Respondents argued, the Respondents' position during the representation case that Roberts and Rosales were temporary renovation employees who did not share a community of interest with the regular maintenance employees is actually consistent with its position here.

The General Counsel would have us infer, from vacancy reports showing a steady turnover of apartments, that the Respondents had a steady supply of renovation work. As the judge recognized, however, the vacancy reports do not indicate whether an apartment has previously been refurbished, or the condition of an apartment when vacated. Thus, merely demonstrating that vacancies existed at the time of the layoffs does not undermine the Respondents' lack of work defense.[12]

It is true that there is some variation in the testimony as to how many, if any, vacant apartments still requiring "refurbishment" existed at the time of the discharges.[13] This variation stems from a lack of definition on the record of the terms "vacant," "renovate," and "refurbish." In the representation case, Matthews testified that Roberts and Rosales were working on two vacancies. In this case, Matthews explained that what he meant by his representation case testimony was that there remained only two vacant apartments that needed major renovation work. He later reiterated that, at the time of the representation case, he still had two or three apartments that needed refurbishing, but that, by December 2000, he had no more apartments to refurbish. It is clear, from a reading of his testimony as a whole, that when Matthews referred to "vacant" apartments, he meant apartments that needed virtually complete renovation. The General Counsel, apparently attempting to show that there was still substantial renovation work to do, asked Matthews to identify those apartments listed on the vacancy reports that had been renovated. In response, Matthews identified those apartments that needed complete renovation versus those that needed only minor plastering and painting. Matthews also testified that he did not intend to

[11] The General Counsel excepted to the judge's statement in his first decision, that Roberts was employed "principally to participate in a project to renovate," as inconsistent with the evidence that the Respondents hired Roberts about a year before any renovation project began. We decline to read so much into this alleged inconsistency. John knew at that time he acquired the buildings that they required substantial renovation. It surely is no stretch to infer that John anticipated using Roberts, whom he hired from his predecessor, to do the renovation work that started shortly thereafter.

[12] Similarly, our dissenting colleague argues that, because there was not a sharp drop in the vacancy rate, there continued to be maintenance work related to apartment turnover. We do not dispute that a minimal amount of maintenance work remained—work that could be done by the regular employee complement. We note that Roberts, himself, fixed the percentage of time that he spent doing general maintenance work, as opposed to "apartment reconstruction," at a mere 15 percent of his time. Moreover, Roberts admitted that he never filled in for the superintendent or handyman, and that they did the plumbing and electrical work, which he could not do. Finally, we note, contrary to the dissent's assertion, that Roberts' testimony—that the superintendent informed him on the morning of his discharge that his next assignment was to work on two vacant apartments—*was* effectively rebutted, by none other than Rosales. Indeed, Rosales testified that their job assignments were always issued when they arrived in the morning, and that, not only was he *not told* on the day he was discharged what his next assignment would be, but also that "they would never tell us what we were going to be doing the next day unless we were already inside an apartment and we would have to know. . . ."

[13] Acevedo testified that 20–30 apartments in 3300 had been completely renovated, and that all others had been replumbed, rewired, and repaired to the extent necessary to meet code. His testimony is consistent with Matthews' testimony that a complete renovation was done to all "down" apartments in 3300; i.e., those 23 apartments listed on the bank's holdback escrow agreement.

Cardona testified that there were still two apartments in 3300 that needed complete renovation. At the time of the complaint case hearing (December, 2001), one had been vacant about 5 months and the other 1 month—i.e., these apartments had been vacated long *after* the discharges. Contrary to Cardona, Matthews testified that these apartments did not need "refurbishment," only cleaning and painting.

"refurbish" those apartments that had not already been refurbished because they did not need it. It is clear that the judge credited Matthews' testimony that, at the time of the discharges, there were no more apartments to renovate.[14]

In addition to arguing that the Respondents' lack of work defense is pretextual, the General Counsel also argues that the Respondents effectively replaced Roberts and Rosales. In this regard, the General Counsel argues that the work previously performed by Roberts and Rosales was, after their discharges, performed by the floaters, Jesus and Abraham. The porter, Cardona, discredited elsewhere by the judge, testified that Jesus had worked at Bailey since the discharges. Matthews, credited elsewhere by the judge, denied this. Even under Cardona's version of the facts, Jesus worked the "same hours" and performed the "same work" that he had performed before the discharges, i.e., there was no increase in work after the discharges.[15]

In sum, we believe that the fact that the Respondents did not, in the year after the representation hearing, replace either Roberts or Rosales stands as strong evidence that the Respondents, indeed, did not require their services. Moreover, as the judge found, the Respondents now appear to be operating Bailey consistent with the same employee complement they use at their other locations, i.e., a superintendent (Acevedo), a porter (Cardona), and sometimes a handyman (unsuccessfully filled at Bailey by a succession of employees). As the judge emphasized, the Respondents neither campaigned against the Union, nor fired Cardona, whom they knew voted for the Union. We thus conclude that the Respondents have met their affirmative burden under *Wright Line* of demonstrating that they would have discharged Roberts and Rosales, even absent their union activities, for lack of work at the time of the discharges.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

MEMBER LIEBMAN, dissenting.

The Respondents, who manage the Bailey Gardens apartment complex, simultaneously terminated two, pro-union maintenance employees, Matthew Roberts and Alfredo Rosales, after they testified adversely to the Respondents in a Board representation hearing. Unlike the judge and my colleagues, I am not persuaded that lack of work (the reason offered by the Respondents) explains *why* both Roberts and Rosales were terminated, *when* they were terminated. There may well have been less work for them to do, and, indeed, one or both of them might ultimately have been let go. But, in my view, the Respondents have failed to prove that both were terminated at once because—precisely at that point—the Respondents determined there was nothing more for either of them to do. Making sure that the two union supporters, in a six-employee unit, could not vote in the upcoming representation election seems the likelier explanation, and not just a happy coincidence.

My colleagues assume, without deciding, that the General Counsel carried his initial burden under *Wright Line*[1] by demonstrating that antiunion animus was a motivating factor in the Respondents' decision to terminate Roberts and Rosales. That assumption permits the majority to reach, and accept, the Respondents' defense. But it also allows my colleagues to gloss over the strength of the General Counsel's case. I believe that the General Counsel has made a strong showing of unlawful motive here. And where the General Counsel makes such a showing, the employer's rebuttal burden is substantial. *Desert Aggregates*, 340 NLRB 1389, 1391 (2003), citing *Eddyledon Chocolate Co.,* 301 NLRB 887, 890 (1991).

The timing evidence in this case convincingly establishes that protected activity was a motivating factor in the discharges.[2] Roberts and Rosales were discharged just 1 week after the Regional Director issued a decision including them in the voting unit—over the Respondents' objections—and just 2 weeks before the December 22, 2000 directed election. The inference is obvious: the Respondents wanted to make sure that the two pro-

[14] The General Counsel's claim in its exceptions that 40 percent of the apartments still need to be renovated stems from a *single statement* by Matthews that around 60 percent of the apartments in Bailey Gardens have been completely refurbished. The General Counsel assumes, with no record support, that the other 40 percent need complete renovation. In fact, to the contrary, Matthews testified that he did not intend to refurbish all of the apartments because not all of the apartments needed refurbishment.

[15] Acevedo's testimony regarding this issue is unavailing. As noted above, when asked by the General Counsel on direct: "[W]ho's been working there *since* [Roberts and Rosales] were laid off," Acevedo named Torres, Peres, and a third man whose name he could not recall; Torres and Peres each "arrived as a handyman." Asked by the judge "about the two people that went to Bailey, Jesus and Abraham," Acevedo testified that they "also arrived as handymen," and worked merely 2 or 3 weeks (Acevedo did not specify a timeframe for this work). Roberts further undercut the General Counsel's case by testifying, on cross-examination, that the statement in his affidavit that "Jesus and Abraham replaced him" was "incorrect"; he also disavowed his prior averment that Jesus and Abraham now "work specifically and regularly at 3138, 3150, and 3300."

[1] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 445 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[2] See, e.g., *Techno Construction Corp.*, 333 NLRB 75 (2001) (timing of layoff immediately following employee's expression of desire for continued union representation warranted inference of animus).

union employees were not eligible to vote.[3] Indeed, the Respondents were clearly willing to go to some lengths to keep Roberts and Rosales from voting. To support the argument that the two employees were temporary and would soon be transferred to a different location, the Respondents falsely asserted that Robert and Rosales were hourly paid workers, contrary to the documentary evidence that they had been salaried employees from their hire. It is telling, too, that the Respondents did not transfer the two employees (despite indicating it would at the hearing), but terminated them instead. That step, assuming it was upheld, would decisively settle the question of voting eligibility, as transfer might not. The timing evidence alone is enough to satisfy the General Counsel's initial burden here. And, as I have said, the weight of that evidence establishes what the Respondents must overcome to prove their lack-of-work defense. There is certainly evidence tending to show that renovation work at Bailey Gardens had declined. What is missing, however, is an overriding nexus between that decline and the decision to terminate both Roberts and Rosales, simultaneously, just when it was to Respondent's great advantage to do so in connection with the union election. The issue is not whether the Respondents reasonably *could* have let the two employees go, based on lack of work.[4] The issue, rather, is whether this was the actual, overriding reason for the Respondents' action. The majority relies on the judge's finding that Roberts and Rosales were primarily hired to do renovation work and on the credited testimony of Property Manager Matthews, handyman Acevedo, and Owner John that that work was mostly completed by December 2000. But Roberts was hired more than a year before the renovation project began. It is highly doubtful that the Respondents employed Roberts for such a long period simply in anticipation of the renovation project. Surely he must have been doing some other work. In fact, of course, it is undisputed that both Roberts and Rosales performed not only renovation, but also standard repair and maintenance work in both occupied and vacant apartments and in the common areas of the buildings.[5] With respect to vacant apartments in particular, there is no evidence of a sharp drop in the vacancies, which would have entailed a corresponding decline in maintenance work related to apartment turnover. Hence, the testimony that no apartments remained to be renovated does not establish that Roberts and Rosales lacked work. In turn, there is clear evidence that maintenance work remained to be done at Bailey Gardens at the time Roberts and Rosales were discharged. Notably, the two employees were employed for several years *after* the bulk of the renovations at Bailey Gardens, which involved an outside contractor, were completed. They did routine maintenance work, as well as residual renovation work. The record simply does not establish that this work somehow evaporated for both men simultaneously, just before they would have voted in the union election. According to Roberts' unrebutted testimony, the Respondents' superintendent informed him on the very morning of his discharge that he would be working on two apartments that had been vacated. Moreover, two floater employees who normally worked at whichever of Respondent's several facilities required additional maintenance, were working intermittently at Bailey Gardens both in the week prior to the discharge of Roberts and Rosales and thereafter.[6] In addition, the Respondent hired and fired a succession of three handymen subsequent to the discharges.[7] Given the powerful evidence that the discharges were driven by the union election, the Respondents had a very heavy burden here to show that they would have let both Roberts and Rosales go precisely when they did, because there suddenly was no work for them. Unlike my colleagues, I am not nearly persuaded that this was the case.

[3] Based on the small size of the voting unit, it is probable that the votes of Roberts and Rosales would be determinative of the outcome of an election and that the Respondent would, in any event, have perceived them as such. The initial election, ordered by the judge in the representation case, was set aside by agreement of the parties, and a second election, held a month later, was also set aside pursuant to objections filed by the Respondent.

[4] See, e.g., *T & J Trucking Co.*, 316 NLRB 771 (1995).

[5] Although the judge recognized that "their work overlapped with that done by superintendents and handymen," he nevertheless asserted that Roberts and Rosales worked "as renovation workers, a category apart from the Company's normal maintenance workers." The judge does not explain the basis for this assertion, nor have my colleagues.

[6] The majority insists that Acevedo's testimony that the floater employees worked for 2 to 3 weeks at Bailey Gardens is unavailing because it was unspecific as to time. But Acevedo gave this testimony in the context of questioning on direct examination about the series of handymen who were hired and fired *after* the discharges. It is evident from the judge's discussion of this evidence that he understood the testimony as indicating that floater employees came to Bailey Gardens after the discharges. No party has excepted on that basis.

[7] The majority also appears to disregard this evidence, because the handymen were qualified to perform not only routine maintenance work previously done by Roberts and Rosales, but also electrical and plumbing work that they could not perform. In the absence of any evidence that the handymen were hired exclusively or even primarily to do electrical and plumbing work, the fact that they possessed these additional qualifications is likewise irrelevant.

Karen Newman, Esq., for the General Counsel.
Jeffrey D. Pollack, Esq. and *Jerald M. Stein Esq.,* for the Respondents.
Katchen Locke, Esq., for the Union.

SUPPLEMENTAL DECISION

RAYMOND P. GREEN, Administrative Law Judge. On November 22, 2002, the Board remanded a portion of this case to me for further findings and conclusions regarding the alleged discriminatory discharges of Mathew Roberts and Alfredo Rosales.

After considering the supplemental briefs filed by the parties and reviewing the record, I hereby reaffirm my original decision and recommend that the complaint be dismissed.

The Board noted that under *Wright Line*, 251 NLRB 1083, (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*, 462 U.S. 393, 399–403 (1983), the General Counsel is required to make an initial "showing sufficient to support the inference that protected conduct was a 'motivating factor' in the Employer's decision and if such a showing is made, the burden shifts whereupon the Employer is required to demonstrate that the same action would have taken place even in the absence of the protected conduct." The Board further stated that in order to meet the initial burden, the General Counsel must establish four elements; (1) the existence of activity protected by the Act;[1] (2) the Employer's knowledge of that activity;[2] (3) the imposition of some adverse employment action; and (4) the existence of a motivational link, or nexus, between the protected activity and the adverse employment action.

In my earlier decision, I concluded that the first three elements were present. The evidence showed that the employees were engaged in union activity; that the Employer was aware of that activity; and that they suffered an adverse employment action. The difficulty I had then and which I continue to have now, is concluding that the General Counsel established by a preponderance of the evidence, any motivational link or nexus.

As pointed out by the Respondent, it did not engage in any type of election campaign either before or after the Union filed a petition in Case 2–RC–22297. Its management and supervisors made no antiunion speeches to employees, distributed no literature, and held no meetings with employees either singly or in groups, in order to convince them to vote against the Union.

To be sure, an employee, Cardona, testified that on or about September 11, Thomas Mathews asked him why he signed for the Union and that they had some kind of a discussion about benefits. But I did not credit Cardona's testimony because it was clear to me that the two men spoke in different languages and that Cardona's lack of English comprehension made his recitation of what he heard, extremely unreliable.

Another employee, Fidencio Frias, testified that sometime in November 2000, Thomas Mathews said, "why did you sign for Union?" He also testified that Thomas Mathews mentioned Mathew Roberts. But Frias' testimony on this subject was murky at best. In my original decision, I concluded that this one conversation did not, even if credited, evidence animus. I now conclude that I don't credit Frias on this point.

As noted in my original decision, I dismissed the 8(a)(3) allegations concerning Frias and credited the Company's version of what took place on December 12 and 13, 2000.[3] I also noted that Frias had a "somewhat volatile temperament." This was evidenced not only by his demeanor at the hearing, but also by his past difficulties with the law. In short I conclude that he was not a reliable witness.

Based on this record, I would conclude, that the General Counsel has not made out, by a preponderance of the evidence, a prima facie case because she has not shown evidence of a motivational link or nexus, between the employees' protected activity and their discharges.

Moreover, I would also conclude that even if there was sufficient proof of such a link, the Employer has established that it would have laid off these employees for lack of work when it did so. The evidence here, including the credible testimony of Thomas Mathews, Jose Acevado, and Thomas John, showed that renovation work had been mostly completed by December 2000. While it is true that Mathew Roberts was originally hired by the Respondent to work at Bailey Gardens, the fact is that he was put on the payroll of the contractor who was engaged to do renovation work on these apartments. And while, Roberts was kept on by the Respondent after the contractor left, he and Alfred Rosales (hired as Robert's assistant), were primarily engaged in the renovation of apartments as they were vacated.

The evidence shows that Roberts and Rosales worked in these buildings, not as superintendents, handymen, or porters, but rather as renovation workers, a category apart from the Company's normal maintenance workers. And while the nature of their work overlapped with that done by superintendents and handymen, the fact is that neither had the boiler license or the electrical or plumbing experience that was required of either a superintendent or handyman.

The evidence showed that renovation work, by December 2000, had diminished to an extent that Roberts and Rosales were spending much of their day hanging out.[4] And although the evidence shows that the Company made subsequent attempts to hire people after they were laid off, it tried to hire people with the licenses and work experience of handymen.

[1] In some situations a violation may be found even if the employee did not engage in protected activity. This would occur when the Employer was motivated by its belief that the employee engaged in protected activity.

[2] Proof of knowledge need not be shown by direct evidence. The General Counsel may establish that an Employer is aware of union or protected activity by the use of circumstantial evidence such as timing and/or pretext.

[3] The General Counsel did not take exceptions to my decision to dismiss the 8(a)(3) allegation concerning Frias.

[4] It makes no difference whether the bulk of the refurbishing work was completed by 1998 or 1999. It is clear that after the contractor finished its work, Roberts and Rosales were hired by the Respondent and continued to do this work, as well as normal restoration work as tenants left and new tenants arrived. The relevant point is that over time, the amount of their work decreased because as apartments were refurbished, the amount of time spent on normal or ordinary renovation dropped and they had less and less to do.

Also the Company, from time-to-time, used floaters to do work that Roberts and Rosales might otherwise have done. But these floaters were long-time employees who were normally used for this purpose. Their use would make economic sense instead of requiring the Company to continue to employ two employees whose workload had diminished to the extent that it had.[5]

ORDER

For all of the foregoing reasons, I reaffirm my original recommendation that the complaint be dismissed.

[5] The General Counsel argues that at the time of their terminations, 60 percent of the apartments had been refurbished. She therefore concludes that 40 percent of the apartments were still in need of refurbishment and that there was plenty of this type of work for Roberts and Rosales to do. But the fact that 60 percent of the apartments had been refurbished, does not prove that the other 40 percent required complete or even partial refurbishment. Moreover, even if this was the case, refurbishing these apartments could only be undertaken as the tenants of these apartments vacated them, which might or might not occur at indeterminate times in the future. (Indeed, the fact that a tenant vacated an apartment did not make the apartment automatically accessible. If a tenant simply left without turning over the keys, the landlord needed to obtain a judicial eviction in order to enter.) Thus the fact that 60 percent of the apartments had been refurbished does not mean that there was a significant amount of readily available work for Roberts and Rosales after December 8, 2000. And in this connection, I credit the testimony of the Company's witnesses to the contrary.